

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD R. HARRISON,

Defendant-Appellant.

UNPUBLISHED

May 16, 1997

No. 188025

Oakland Circuit Court

LC No. 94-133177-FH

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to five to fifteen years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to convict him of assault with intent to do great bodily harm less than murder because there was no evidence presented at trial that he possessed the requisite intent. He also argues that the verdict was against the great weight of the evidence. We disagree.

A conviction for the crime of assault with intent to do great bodily harm less than murder requires proof of an assault, coupled with an intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). The crime of assault with intent to do great bodily harm requires proof of specific intent. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). The specific intent necessary to constitute the offense may be found in conduct as well as words. *Id.*

Here, evidence was presented that defendant struck the victim in the face with a beer bottle, and punched and kicked him repeatedly while wearing heavy work boots. Doctors testified that the injury to the victim's knee must have been caused by a significant amount of force. Several witnesses testified that the victim was on the ground and could not get up, and defendant did not stop beating him until the police were called. From this evidence, the jury could reasonably have inferred that defendant

intended to cause Green great bodily harm. Defendant contends that he did not intend to injure Green, but rather acted in self defense. However, when reviewing the sufficiency of the evidence, this Court may not interfere with the jury's role of determining the weight and credibility of the evidence. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993). Therefore, viewed in a light most favorable to the prosecution, the evidence was sufficient from which a reasonable trier of fact could have inferred that defendant intended to cause Green great bodily harm. *People v McCrady*, 213 Mich App 474, 484; 540 NW2d 718 (1995). Likewise, the testimony of the prosecution's witnesses was sufficiently credible to support the verdict. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Defendant next argues that he was denied the effective assistance of counsel by his trial counsel's failure to advise him against pleading guilty to being an habitual offender when the supplemental information was not timely filed, and by pleading guilty, he waived the right to challenge it. We disagree

The prosecution filed a supplemental information charging defendant as a second felony offender on June 15, 1994, the day before defendant's arraignment. That information charged that defendant had been convicted on October 25, 1990, of breaking and entering an occupied dwelling with intent to commit larceny. On June 26, 1995, the prosecution filed its first amended habitual offender information which corrected the original information and indicated that defendant's conviction on October 25, 1990, was for felonious assault. Because the original, timely filed information was sufficient to notify defendant of the consequences should he be convicted of the underlying felony, the trial court had the authority to allow the prosecutor to amend the information. See MCL 767.76; MSA 28.1016; *People v Stewart*, 219 Mich App 38, 44; 555 NW2d 715 (1996). Therefore, defendant has not demonstrated that he was denied the effective assistance of counsel by trial counsel's failure to advise him against pleading guilty to being an habitual offender, second offense.

Defendant next argues that he is entitled to a new trial because of several instances of prosecutorial misconduct. When reviewing such a claim, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

First, defendant argues that the prosecutor improperly commented on defendant's failure to come forward and tell the police his version of events. Because defendant's silence or nonresponsive conduct in this case did not occur during custodial interrogation, and was not in reliance on the *Miranda* warnings, it was not constitutionally protected. *People v Martinez*, 190 Mich App 442; 476 NW2d 641 (1991). Therefore, its use as substantive evidence did not violate defendant's rights under the Fifth and Fourteenth Amendments, or under the Michigan Constitution. *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992).

Second, defendant claims that the prosecutor improperly attempted to introduce evidence that a defense witness threatened a prosecution witness. However, the defense objected to the question, the trial court sustained the objection, and the witness did not answer the question. The jury was later

instructed that the lawyer's questions to witnesses were not evidence. These actions were sufficient to cure any prejudice caused by the questioning. *People v Curry*, 175 Mich App 33, 44; 437 NW2d 310 (1989).

Third, defendant contends that he was denied a fair trial by the prosecutor's questioning of a defense witness regarding a 1981 conviction for obstructing police. Defense counsel objected to the question, the trial court sustained the objection and instructed the jury to disregard what was said. This curative instruction was sufficient to eliminate any prejudice caused by the remark, and defendant was not denied a fair trial.

Fourth, defendant asserts that the prosecutor made remarks in her closing arguments which improperly denigrated his theory of defense and denied him a fair trial. We disagree.

It is improper for the prosecutor to suggest that defense counsel was intentionally trying to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The prosecutor may not suggest that the defendant must prove something or present a reasonable explanation for damaging evidence. *People v Vaughn*, 186 Mich App 376, 385; 465 NW2d 365 (1990). However, a prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief, and the prosecutor is not required to state inferences and conclusions in the blandest possible terms. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, the prosecutor's comments were a proper argument from the facts that defendant was not worthy of belief, and, therefore, did not deny defendant a fair and impartial trial.

Finally, defendant argues that his sentence is disproportionate. We disagree. The sentence imposed is proportionate to the seriousness of the circumstances surrounding both the offense and the offender. *People v Milbourn*, 435 Mich 630; 465 NW2d 1 (1990).

Affirmed.

/s/ Richard A. Bandstra

/s/ Richard Allen Griffin

/s/ E. Thomas Fitzgerald